

AMENDED IN SENATE JUNE 15, 2014
AMENDED IN ASSEMBLY MAY 13, 2014
AMENDED IN ASSEMBLY MAY 5, 2014
AMENDED IN ASSEMBLY APRIL 8, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2065

Introduced by Assembly Members Melendez, Garcia, and Gorell

February 20, 2014

An act to ~~amend Sections 8547.2, 8547.3, and 8547.5 of, and to add Section 8547.14 to, add Article 11 (commencing with Section 9149.30) to Chapter 1.5 of Part 1 of Division 2 of Title 2 of the Government Code, relating to the Legislature.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 2065, as amended, Melendez. ~~California Whistleblower Protection Act~~: *Legislative Employee Whistleblower Protection Act*: Legislature: employees.

Existing law provides procedures for a person to file a complaint alleging violations of legislative ethics. Existing law also authorizes each house of the Legislature to adopt rules for its proceedings and to select committees necessary for the conduct of its business.

This act would prohibit retaliation against legislative employees, as defined, who make protected disclosures of ethics violations. This act would establish a procedure for legislative employees to report acts of retaliation. The act would also impose civil and criminal liability on a person who engages in retaliatory acts, as specified.

The California Whistleblower Protection Act prohibits an employee from using his or her official authority or influence for the purpose of intimidating, threatening, coercing, or commanding any person for the purpose of interfering with his or her right to make a protected disclosure of improper governmental activity. “Employee” is defined to include specified employees in the executive and judicial branches of state government. The act requires the State Auditor to investigate and report on improper governmental activities, as specified. The act authorizes an employee or applicant for employment who files a written complaint alleging reprisal, retaliation, or similar prohibited acts to also file a copy of the written complaint with the State Personnel Board, together with a sworn statement that the complaint is true, under penalty of perjury. The act provides that any person who intentionally engages in acts of reprisal, retaliation, or similar prohibited acts against a state employee or applicant for state employment for having made a protected disclosure, is subject to punishment for a misdemeanor, and shall be liable in an action for civil damages brought by the injured party.

~~This bill would make these provisions of the act applicable to the Legislature, except that procedures regarding notices of adverse action and the State Personnel Board would not apply, penalties would not apply to the extent that a Member of the Legislature is immune from liability under the doctrine of legislative immunity, and a Member of the Legislature would not be a person permitted to submit an allegation to initiate an investigation against the Legislature or a Member or an employee of the Legislature. The bill would authorize an employee of the Legislature or an applicant for employment with the Legislature to file a written complaint with his or her supervisor, manager, or other officer designated by the Committee on Rules of the Assembly or Senate, as applicable, alleging improper acts, together with a sworn statement that the complaint is true, under penalty of perjury, within one year of the most recent improper act complained about. The bill would require the Committees on Rules of the Assembly and Senate to each designate an officer to receive these written complaints. By expanding the scope of crimes under the act, the bill would impose a state-mandated local program.~~

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 11 (commencing with Section 9149.30) is
2 added to Chapter 1.5 of Part 1 of Division 2 of Title 2 of the
3 Government Code, to read:

4
5 Article 11. Legislative Employee Whistleblower Protection Act

6
7 9149.30. This article shall be known and may be cited as the
8 Legislative Employee Whistleblower Protection Act.

9 9149.31. The Legislature finds and declares that legislative
10 employees should be free to report ethical violations without fear
11 of retribution.

12 9149.32. For the purposes of this article, the following words
13 have the following meanings:

14 (a) "Legislative employee" means an individual, other than a
15 Member of either house of the Legislature, who is currently
16 employed by either house of the Legislature.

17 (b) "Protected disclosure" means the filing of a complaint
18 alleging a violation of Article 2 of Chapter 1 of this part or of any
19 standard of conduct, as defined by the standing rules of either
20 house of the Legislature.

21 (c) "Use of official authority or influence" includes promising
22 to confer, or conferring, any benefit; effecting, or threatening to
23 effect, any reprisal; or taking, or directing others to take, or
24 recommending, processing, or approving, any personnel action,
25 including, appointment, promotion, transfer, assignment,
26 performance evaluation, suspension, or other disciplinary action.

27 9149.33. (a) A Member of the Legislature or legislative
28 employee shall not directly or indirectly use or attempt to use that
29 person's official authority or influence for the purpose of
30 intimidating, threatening, coercing, commanding, or attempting
31 to intimidate, threaten, coerce, or command a legislative employee
32 for the purpose of interfering with the right of the legislative
33 employee to make a protected disclosure.

1 (b) *Nothing in this section shall be construed to authorize an*
2 *individual to disclose information otherwise prohibited by or under*
3 *law.*

4 (c) *This section does not prevent a supervisor, manager, or*
5 *other officer of the Legislature from taking, directing others to*
6 *take, recommending, or approving any personnel action or from*
7 *taking or failing to take a personnel action with respect to any*
8 *legislative employee if the supervisor, manager, or other officer*
9 *reasonably believes any action or inaction is justified on the basis*
10 *of evidence separate and apart from the fact that the person has*
11 *made a protected disclosure.*

12 9149.34. *A legislative employee may file a written complaint*
13 *with either house of the Legislature pursuant to its rules alleging*
14 *actual or attempted acts of reprisal, retaliation, threats, coercion,*
15 *or similar improper acts prohibited by Section 9149.33. The*
16 *complaint, together with a sworn statement under penalty of*
17 *perjury that the contents of the complaint are true, or are believed*
18 *by the affiant to be true, shall be filed within one year of the most*
19 *recent improper act complained about.*

20 9149.35. *Except to the extent that a Member of the Legislature*
21 *is immune from liability under the doctrine of legislative immunity,*
22 *a person who violates Section 9149.33 is subject to a fine not to*
23 *exceed ten thousand (\$10,000) and imprisonment in a county jail*
24 *for a period not to exceed one year.*

25 9149.36. (a) *In addition to all other penalties provided by law,*
26 *except to the extent that a Member of the Legislature is immune*
27 *from liability under the doctrine of legislative immunity, a person*
28 *who violates Section 9149.33 shall be liable in a civil action for*
29 *damages brought by a legislative employee.*

30 (b) (1) *In any civil action, once it has been demonstrated by a*
31 *preponderance of evidence that an activity protected by this article*
32 *was a contributing factor in the alleged retaliation against a*
33 *legislative employee, the burden of proof shall be on the offending*
34 *party to demonstrate by clear and convincing evidence that the*
35 *alleged action would have occurred for legitimate, independent*
36 *reasons even if the legislative employee had not made a protected*
37 *disclosure.*

38 (2) *Punitive damages may be awarded by the court if the acts*
39 *of the offending party are proven to be malicious. If liability is*

1 *established, the injured party shall also be entitled to reasonable*
2 *attorney's fees as provided by law.*

3 *(c) A legislative employee is not required to file a complaint*
4 *pursuant to Section 9149.34 before bringing an action for civil*
5 *damages.*

6 *9149.37. This article does not diminish the rights, privileges,*
7 *or remedies of a legislative employee under any other federal or*
8 *state law.*

9 ~~SECTION 1. Section 8547.2 of the Government Code is~~
10 ~~amended to read:~~

11 ~~8547.2. For the purposes of this article, the following terms~~
12 ~~have the following meanings:~~

13 ~~(a) (1) "Employee" means any of the following:~~

14 ~~(A) An individual appointed by the Governor.~~

15 ~~(B) An individual employed or holding office in a state agency~~
16 ~~as defined by Section 11000, including, for purposes of Sections~~
17 ~~8547.3 to 8547.7, inclusive, an employee of the California State~~
18 ~~University.~~

19 ~~(C) A Member or employee of the Legislature for purposes of~~
20 ~~Sections 8547.3 to 8547.7, inclusive, except for those provisions~~
21 ~~of Section 8547.4 concerning notice of adverse action and the State~~
22 ~~Personnel Board.~~

23 ~~(D) An individual appointed by the Legislature to a state board~~
24 ~~or commission.~~

25 ~~(E) A person employed by the Supreme Court, a court of appeal,~~
26 ~~a superior court, or the Administrative Office of the Courts for the~~
27 ~~purposes of Sections 8547.3 to 8547.7, inclusive, and Section~~
28 ~~8547.13, except for those provisions of Section 8547.4 concerning~~
29 ~~notice of adverse action and the State Personnel Board.~~

30 ~~(2) For purposes of this subdivision, "employee" includes a~~
31 ~~former employee who met the criteria of this subdivision during~~
32 ~~his or her employment.~~

33 ~~(b) "Illegal order" means a directive to violate or assist in~~
34 ~~violating a federal, state, or local law, rule, or regulation, or an~~
35 ~~order to work or cause others to work in conditions outside of their~~
36 ~~line of duty that would unreasonably threaten the health or safety~~
37 ~~of employees or the public.~~

38 ~~(c) "Improper governmental activity" means an activity by a~~
39 ~~state agency or by an employee that is undertaken in the~~
40 ~~performance of the employee's duties, undertaken inside a state~~

1 office, or, if undertaken outside a state office by the employee,
2 directly relates to state government, whether or not that activity is
3 within the scope of his or her employment, and that (1) is in
4 violation of any state or federal law or regulation, including, but
5 not limited to, corruption, malfeasance, bribery, theft of
6 government property, fraudulent claims, fraud, coercion,
7 conversion, malicious prosecution, misuse of government property,
8 or willful omission to perform duty, (2) is in violation of an
9 Executive order of the Governor, a California Rule of Court, or
10 any policy or procedure mandated by the State Administrative
11 Manual or State Contracting Manual, or (3) is economically
12 wasteful, involves gross misconduct, incompetency, or inefficiency.
13 For purposes of Sections 8547.4, 8547.5, 8547.7, 8547.10, and
14 8547.11, “improper governmental activity” includes any activity
15 by the University of California or by an employee, including an
16 officer or faculty member, who otherwise meets the criteria of this
17 subdivision. For purposes of Sections 8547.4, 8547.5, and 8547.13,
18 “improper governmental activity” includes any activity by the
19 Supreme Court, a court of appeal, a superior court, or the
20 Administrative Office of the Courts, or by an employee thereof,
21 who otherwise meets the criteria of this subdivision. For purposes
22 of Sections 8547.4, 8547.5, 8547.7, and 8547.14, “improper
23 governmental activity” includes any activity by the Legislature or
24 by an employee thereof who otherwise meets the criteria of this
25 subdivision.

26 (d) “Person” means an individual, corporation, trust, association,
27 a state or local government, or an agency or instrumentality of any
28 of the foregoing.

29 (e) “Protected disclosure” means a good faith communication,
30 including a communication based on, or when carrying out, job
31 duties, that discloses or demonstrates an intention to disclose
32 information that may evidence (1) an improper governmental
33 activity, or (2) a condition that may significantly threaten the health
34 or safety of employees or the public if the disclosure or intention
35 to disclose was made for the purpose of remedying that condition.
36 Protected disclosure specifically includes a good faith
37 communication to the California State Auditor’s Office alleging
38 an improper governmental activity and any evidence delivered to
39 the California State Auditor’s Office in support of the allegation.

1 ~~“Protected disclosure” also includes, but is not limited to, a~~
2 ~~complaint made to the Commission on Judicial Performance.~~

3 ~~(f) “State agency” is defined by Section 11000. “State agency”~~
4 ~~includes the University of California for purposes of Sections~~
5 ~~8547.5 to 8547.7, inclusive, and the California State University~~
6 ~~for purposes of Sections 8547.3 to 8547.7, inclusive. Sections~~
7 ~~8547.3 to 8547.7, inclusive, shall apply to the Supreme Court, the~~
8 ~~courts of appeal, the superior courts, the Administrative Office of~~
9 ~~the Courts, and the Legislature in the same manner as they apply~~
10 ~~to a state agency.~~

11 ~~SEC. 2. Section 8547.3 of the Government Code is amended~~
12 ~~to read:~~

13 ~~8547.3. (a) An employee may not directly or indirectly use or~~
14 ~~attempt to use the official authority or influence of the employee~~
15 ~~for the purpose of intimidating, threatening, coercing, commanding,~~
16 ~~or attempting to intimidate, threaten, coerce, or command any~~
17 ~~person for the purpose of interfering with the rights conferred~~
18 ~~pursuant to this article.~~

19 ~~(b) For the purpose of subdivision (a), “use of official authority~~
20 ~~or influence” includes promising to confer, or conferring, any~~
21 ~~benefit; effecting, or threatening to effect, any reprisal; or taking,~~
22 ~~or directing others to take, or recommending, processing, or~~
23 ~~approving, any personnel action, including, but not limited to,~~
24 ~~appointment, promotion, transfer, assignment, performance~~
25 ~~evaluation, suspension, or other disciplinary action.~~

26 ~~(c) Any employee who violates subdivision (a) may be liable~~
27 ~~in an action for civil damages brought against the employee by~~
28 ~~the offended party, except to the extent that a Member of the~~
29 ~~Legislature is immune from liability under the doctrine of~~
30 ~~legislative immunity. For purposes of this section, a Member of~~
31 ~~the Legislature is not an offended party who may bring an action~~
32 ~~for damages if the employee who violates subdivision (a) is a~~
33 ~~Member or an employee of the Legislature.~~

34 ~~(d) Nothing in this section shall be construed to authorize an~~
35 ~~individual to disclose information otherwise prohibited by or under~~
36 ~~law.~~

37 ~~SEC. 3. Section 8547.5 of the Government Code is amended~~
38 ~~to read:~~

39 ~~8547.5. (a) The State Auditor shall create the means for the~~
40 ~~submission of allegations of improper governmental activity both~~

1 by transmission via mail or other carrier to a specified mailing
2 address and electronic submission through an Internet Web site
3 portal. The State Auditor may request that a person submitting an
4 allegation provide his or her name and contact information and
5 provide the names and contact information for any persons who
6 could help to substantiate the claim. However, the State Auditor
7 shall not require any person submitting an allegation to provide
8 his or her name or contact information and shall clearly state on
9 the agency Internet Web site that this information is not required
10 in order to submit an allegation.

11 (b) Upon receiving specific information that any employee or
12 state agency has engaged in an improper governmental activity,
13 the State Auditor may conduct an investigation of the matter. The
14 identity of the person providing the information that initiated the
15 investigation, or of any person providing information in confidence
16 to further an investigation, shall not be disclosed without the
17 express permission of the person providing the information except
18 that the State Auditor may make the disclosure to a law
19 enforcement agency that is conducting a criminal investigation.

20 (c) Notwithstanding the definition of “person” in Section 8547.2,
21 a Member of the Legislature is not a person permitted to submit
22 an allegation to initiate an investigation pursuant to this section if
23 the allegation of improper governmental activity is directed against
24 the Legislature or a Member or an employee of the Legislature.

25 SEC. 4. Section 8547.14 is added to the Government Code, to
26 read:

27 8547.14. (a) An employee of the Legislature or applicant for
28 employment with the Legislature may file a written complaint with
29 his or her supervisor, manager, or other officer designated for that
30 purpose by the Committee on Rules of the Assembly or Senate,
31 as applicable, alleging actual or attempted acts of reprisal,
32 retaliation, threats, coercion, or similar improper acts prohibited
33 by Section 8547.3, together with a sworn statement that the
34 contents of the written complaint are true, or are believed by the
35 affiant to be true, under penalty of perjury. The complaint shall be
36 filed within one year of the most recent improper act complained
37 about. The Committees on Rules of the Assembly and Senate shall
38 each designate an officer to receive written complaints for purposes
39 of this subdivision.

1 ~~(b) Except to the extent that a Member of the Legislature is~~
2 ~~immune from liability under the doctrine of legislative immunity,~~
3 ~~any person who intentionally engages in acts of reprisal, retaliation,~~
4 ~~threats, coercion, or similar improper acts against an employee of~~
5 ~~the Legislature or applicant for employment with the Legislature~~
6 ~~for having made a protected disclosure, is subject to a fine not to~~
7 ~~exceed ten thousand dollars (\$10,000) and imprisonment in a~~
8 ~~county jail for a period not to exceed one year.~~

9 ~~(c) In addition to all other penalties provided by law, except to~~
10 ~~the extent that a Member of the Legislature is immune from~~
11 ~~liability under the doctrine of legislative immunity, any person~~
12 ~~who intentionally engages in acts of reprisal, retaliation, threats,~~
13 ~~coercion, or similar acts against a state employee or applicant for~~
14 ~~state employment for having made a protected disclosure shall be~~
15 ~~liable in an action for damages brought against him or her by the~~
16 ~~injured party. Punitive damages may be awarded by the court~~
17 ~~where the acts of the offending party are proven to be malicious.~~
18 ~~Where liability has been established, the injured party shall also~~
19 ~~be entitled to reasonable attorney's fees as provided by law.~~

20 ~~(d) This section does not prevent a supervisor, manager, or other~~
21 ~~officer of the Legislature from taking, directing others to take,~~
22 ~~recommending, or approving any personnel action or from taking~~
23 ~~or failing to take a personnel action with respect to any employee~~
24 ~~of the Legislature or applicant for employment with the Legislature~~
25 ~~if the supervisor, manager, or other officer reasonably believes~~
26 ~~any action or inaction is justified on the basis of evidence separate~~
27 ~~and apart from the fact that the person has made a protected~~
28 ~~disclosure.~~

29 ~~(e) In any civil action, once it has been demonstrated by a~~
30 ~~preponderance of evidence that an activity protected by this article~~
31 ~~was a contributing factor in the alleged retaliation against a former,~~
32 ~~current, or prospective employee, the burden of proof shall be on~~
33 ~~the supervisor, manager, or other officer of the Legislature to~~
34 ~~demonstrate by clear and convincing evidence that the alleged~~
35 ~~action would have occurred for legitimate, independent reasons~~
36 ~~even if the employee had not engaged in protected disclosures or~~
37 ~~refused an illegal order.~~

38 ~~(f) This article does not diminish the rights, privileges, or~~
39 ~~remedies of any employee under any other federal or state law.~~

1 ~~SEC. 5.~~

2 *SEC. 2.* No reimbursement is required by this act pursuant to
3 Section 6 of Article XIII B of the California Constitution because
4 the only costs that may be incurred by a local agency or school
5 district will be incurred because this act creates a new crime or
6 infraction, eliminates a crime or infraction, or changes the penalty
7 for a crime or infraction, within the meaning of Section 17556 of
8 the Government Code, or changes the definition of a crime within
9 the meaning of Section 6 of Article XIII B of the California
10 Constitution.